No. 15,653

IN THE

United States Court of Appeals

For the Ninth Circuit

HARRY T. VON EICHELBERGER and
HAIG MIHRAM TERZIAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

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JURISDICTION.

Jurisdiction is invoked pursuant to Section 7804, 26 U.S.C., Section 3231, 18 U.S.C., Sections 1291 and 1294, 28 U.S.C., and Rules 18 and 37(a) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant Harry T. von Eichelberger was indicted for twenty-four violations of Chapter 53, Machine Guns, 26 U.S.C. Eight counts which involved eight separate military submachine guns, charged appellant with failure to pay the $200.00 per weapon transfer

tax prescribed by Section 5811, 26 U.S.C. Eight additional counts alleged that appellant transferred the same eight weapons to co-appellant Haig Mihram Terzian without the use of the Treasury order form required by Section 5814, 26 U.S.C. Finally, appellant was charged with the receipt of these same eight weapons from sellers who failed to pay the $200.00 transfer tax or use the required order forms in violation of Section 5851, 26 U.S.C.

Co-appellant, Haig Mihram Terzian, was charged in eight counts with the receipt of the same eight machine guns in violation of Section 5851, 26 U.S.C.

Three counts against Harry T. von Eichelberger and one count against Haig Mihram Terzian were dismissed by the trial judge during the government's case (T.R. 84, vol. 2).

Prior to trial, appellants made motions to dismiss and to return and suppress the evidence against them (T.R. 33-35, vol. 1), which motions were denied without prejudice (T.R. 27, vol. 1). These motions were renewed and were denied by the trial judge (T.R. 29, vol. 1).

On behalf of appellant Harry T. von Eichelberger and during trial, a motion was made for the dismissal of seven counts of the indictment upon the grounds that these counts were barred by the statute of limitations, Section 6531, 26 U.S.C., (T.R. 39, vol. 1). The Court denied this motion (T.R. 29, vol. 1).

After conviction, motions for new trial and in arrest of judgment were made by appellants (T.R. 39

and 40, vol. 1). These motions were denied (T.R. 30, vol. 1).

After a Court trial, appellant Harry T. von Eichelberger was convicted on twenty-one counts. He was sentenced to six months imprisonment on each count, all to run concurrently and was fined $100.00 on each count, or a total fine of $2,100.00.

Co-appellant Haig Mihram Terzian was convicted on seven counts, concurrently sentenced to six months imprisonment on each and fined $100.00 on each count, or a total fine of $700.00.

Timely appeal was made to this Court from the judgment of conviction (T.R. 42 and 43, vol. 1).

FACTS.

Appellant Harry T. von Eichelberger was formerly the proprietor of the Far West Hobby Shop, a retail store located on Clement Street in San Francisco. This establishment catered to sportsmen of all types and included a gun department. Among his personal hobbies was the collection of military firearms. Included in his assortment was a representative selection of modern and antique weapons (T.R. 97, vol. 2).

Mr. von Eichelberger purchased government exhibit 1 (U.S. model M-3, caliber .45, submachine gun), exhibit 2 (U.S. model, H & R Reising, caliber .45, submachine gun), exhibit 4 (U.S. model, Thompson submachine gun, .45 caliber) and exhibit 8 (German 9mm caliber submachine gun) from an Air Force

Captain in 1945 (T.R. 104, vol. 2). He paid the latter $800.00 for this group (T.R. 105, vol. 2). Government's exhibit 5 (German submachine gun of 9mm caliber) was purchased in 1949 by him from a Navy Captain for $75.00 (T.R. 105-107, vol. 2). The two remaining weapons, an Italian Beretta 9mm submachine gun and a Russian 7.62mm submachine gun were purchased in 1950 by appellant von Eichelberger for $100.00 from a Navy Lieutenant Commander. All of these weapons were sold by von Eichelberger to Terzian on December 5, 1956 (T.R. 97, vol. 2). A form of conditional sales contract whereby possession of the guns was given to Terzian, but von Eichelberger retained their title until the payment of the purchase price of $300.00 was prepared by von Eichelberger and signed by appellants (T.R. 98, vol. 2). Terzian gave von Eichelberger three checks in part payment. The first check was for $25.00 and was dated December 5, 1956. The other two checks, each for $50.00, represent payments made in January, 1957 by Terzian pursuant to the tenor of the agreement. The agreement is defense exhibit "A" and the checks are "B" in evidence (T.R. 102 and 103, vol. 2).

As of February 14, 1957, Terzian owed von Eichelberger $175.00. According to the contract, von Eichelberger was still owner of the several weapons here involved (T.R. 110, vol. 2).

To properly safeguard the weapons, about February 7, 1957, Terzian requested and was granted permission by his old friend Louis Trost to store them in Trost's garage in San Francisco (T.R. 17, vol. 2).

The submachine guns were boxed and stored (T.R. 15, vol. 2). Trost neither knew of the contents of the boxes nor had Terzian's permission to open the boxes for inspection (T.R. 17, 25 and 26, vol. 2).

On February 14, 1957 Trost went to the offices of the Bureau of Narcotic Enforcement in San Francisco and conversed with agents of the Bureau including John Trainor (T.R. 20-22, vol. 2). Agent Trainor and other went to Trost's garage and using screw drivers opened a group of boxes which contained the submachine guns (T.R. 22, 23, 36, vol. 2).

As between Trost and Terzian, for the storage of the boxes, no rent was charged. The apparent consideration was a favor in return for past favors (T.R. 28, vol. 2). Terzian was to be supplied with a key by Trost so he could enter at will (T.R. 29, vol. 2).

Of especial significance, and possibly determinative of the "search and seizure" issue herein developed, is Trost's answer to a question of him put by the prosecutor about his relationship with Terzian. The question and answer appear on page 31 of Volume 2 as follows:

> "Q. Did you turn over possession of that garage to Mr. Terzian or did you merely let him store some articles in it?
>
> A. I let him store, not only possession."

To view the evidence in a manner most favorable to appellee's position, the record supports the ultimate fact that agent Trainor had Trost's permission to enter his garage (T.R. 21, 22 and 39, vol. 2). On the

other hand, the record supports appellants' position that neither Terzian nor von Eichelberger gave permission to Trost or to the government agents to enter the garage, open the boxes and seize these weapons (T.R. 28, 40 and 110, vol. 2). Inasmuch as there was no search warrant (so stipulated by the government, T.R. 28, vol. 2), one of the principal issues for this Court's determination will be the validity of the search and seizure.

As will be developed, appellants assert personal interest in the property seized, either ownership or right to possession. In the absence of a "pressing emergency" or legal process including a search warrant, appellants contend that the search and seizure violates their constitutional rights and was unreasonable. Further, they contend that their motions to suppress ought to have been granted and that their convictions are not supported by legally admissible or sufficient evidence.

Prior to trial a written stipulation was entered into between the parties. Its purport is to admit that the weapons here involved are within the purview of Section 5848(a), 26 U.S.C. The stipulation further admits that no $200.00 transfer tax was paid as required by Section 5811, 26 U.S.C., and that no order form was used by appellants as required by Section 5814, 26 U.S.C. The stipulation was read into the record of the trial (T.R. 32a and 33, vol. 2).

ISSUES.

Under several headings, appellants propose to demonstrate that their convictions ought to be reversed. We will show:

First. That the transfer of possession of the weapons on December 5, 1956, pursuant to the conditional sales contract of that date was not a "transfer" within the meaning of Chapter 53, Section 5848, 26 U.S.C. This follows because there was no sale, assignment, pledge, lease, loan, gift or final disposition of the weapons as between the parties that occurred on December 5, 1956. Therefore, the evidence to sustain appellants' convictions is legally insufficient.

Second. Chapter 53, which includes within it several provisions, Section 5846, is not complete and it is not self-executory. Other excise tax definitions and procedures are incorporated. Regulations must be promulgated by Treasury officials. Upon its face, the chapter is a trap for the unwary and unknowing, is ambiguous and uncertain, and so far as appellants are concerned violates procedural due process.

Third. The evidence conclusively shows that appellant von Eichelberger obtained possession of the weapons at times more than six years prior to commencement of this prosecution against him. Section 6531, 26 U.S.C., which provides for a six year limitation period, bars his conviction upon seven counts.

Fourth. Appellants assert personal and separate rights to the seized evidence. Appellant Terzian additionally asserts an interest in the garage where the

seizure occurred. They are "parties aggrieved" within the meaning of Rule 41, Federal Rules of Criminal Procedure. They assert their personal constitutional right to be protected against this unreasonable search and seizure. Since neither Trost nor the agents had appellants' permission to enter, open that which was secured and seize, they contend that the search was unreasonable so that their convictions are supported only by legally inadmissible evidence.

ARGUMENT AND AUTHORITIES.

I.

ON DECEMBER 5, 1956, APPELLANT VON EICHELBERGER TRANSFERRED POSSESSION OF THE WEAPONS TO APPELLANT TERZIAN PURSUANT TO A CONDITIONAL SALES CONTRACT. THERE WAS NO TRANSFER WITHIN THE MEANING OF THE SECTION WHICH DEFINES "TRANSFER". THUS THE CHARGING STATUTES ARE INAPPLICABLE, THE EVIDENCE TO SUSTAIN THE CONVICTIONS INSUFFICIENT AND APPELLANTS' CONVICTIONS ARE UNLAWFUL.

Chapter 53, 26 U.S.C. applies. The gist of the chapter as it pertains to the present factual situation is as follows:

1. A $200.00 per weapon transfer tax is to be paid by the transferor [Section 5811 (a) and (b)].

2. A taxable transfer occurs upon a sale, an assignment, a pledge agreement, a lease, a loan, a gift [Section 5848 (10)]. Another classification of taxable transfers may occur if it is of a type

which falls within the provision of the statute which says "or otherwise dispose of".

3. The payment of the tax is represented by stamps [Section 5811 (c) (1)] affixed to an order form signed by transferee [Section 5814 (a) (c) (1)].

At the outset, the problem is to determine how the several words in Section 5848 (10) "Definitions" are to be interpreted. Since the section fails to define what is a "sale", a "loan" or any of the other included words, to what body of law do we turn for their definition?

Congress has plenary tax powers, *Burnet v. Harmel,* (1932), 287 U.S. 103, 110, 77 L.Ed. 199, 204, 53 S.Ct. 74. In the absence of statutory definition, nationwide uniformity demands that State law apply only where such application is the express or implied intent of Congress, *Weiss v. Weiner,* 279 U.S. 337, 73 L.Ed. 721, 49 S.Ct. 337. Since Congress failed to set up its own definitive criteria, California personal property law defining the involved legal interests applies, *Watson v. C.I.R.,* (1952), 345 U.S. 544, 97 L.Ed. 1232, 73 S.Ct. 848 and *Burnet v. Harmel,* ante, 287 U.S. 103, 77 L.Ed. 199, 53 S.Ct. 74.

No tax was paid, no order form was used, and the statutes apply to the guns in question. But is a "conditional sale" agreement a "sale"?

Before discussion of these issues, disposition of the other statutory words contained in Section 5848 (10) will be made, their legal connotations will be ex-

amined and a determination will be made if possibly they may fit this factual situation.

"Assign" or assignment in its broadest possible sense signifies any conveyance or transfer of either real or personal property, *Commercial Discount Co. v. Cowen,* 18 C. 2d 610, 614, 116 P. 2d 599. By normal usage, the word usually applies to the transfer of title to a *chose in action* from one person to another. Nowhere in 26 U.S.C. is "assign" or any of its variants defined. Since tangible personal property is here involved, it follows that this transfer between Harry T. von Eichelberger and Haig Mihram Terzian is not an assignment within the meaning of Section 5848 (10), 26 U.S.C.

Consideration will now be given to the meaning of the word "pledge" as its appears in Section 5848 (10), 26 U.S.C. Nowhere in 26 U.S.C., is this word defined. Under California law a pledge is defined as a deposit of personal property to secure performance of another act by the depositors, California Civil Code, Section 2986. This definition is likewise the common law meaning, 72 C.J.S., Pledges, Section 1, page 3 and *Nelson v. C.I.R.,* C.C.A. 8, 101 F. 2d 568. The instant factual situation does not fall within the scope of this word as set forth in Section 5848 (10), 26 U.S.C. as Harry T. von Eichelberger was under no further contractual obligation.

"Lease" as included in "transfer" is likewise undescribed. As applied to real property its meaning is clearly defined a common law and by statutory enactment as a document whereby a less than free-

hold estate is conveyed by one person to another, 51 C.J.S., Landlord and Tenant, Section 202, page 803, California Civil Code, Section 1624. Applied to the law of personalty, it has much the same connotation as a transaction in realty although the application of the term to a transaction in personalty is a misnomer. From the facts as herein narrated, no lease in the submachine guns was created as between appellants in as much as conditional possession of the weapons passed to Haig Mihram Terzian.

According to Section 5848 (10), 26 U.S.C., "transfer" includes "loan" and possibly its variant "to lend". Congress has not seen fit to define the term in the Internal Revenue Code, 26 U.S.C. However, California Civil Code, Section 1884, defines a loan as a contract for the temporary use of personalty. This is likewise its common law meaning, 54 C.J.C., Loan, page 653, and *Lancaster v. Jordan Auto Co.,* C.C.A. Miss., 121 F. 2d 912. As concerns appellants' relationship there was no loan transaction.

Section 5848 (10), 26 U.S.C., includes "give away" within the meaning of "transfer". Inferentially, its variant "gift" is included. Even in Chapter 12, Gift Tax, 26 U.S.C., the meaning of gift is undefined. California Civil Code, Section 1146 in effect states that a gift is a voluntary transfer of personal property without consideration. This is the common law definition, 38 C.J.S., Gifts, Section 1. a., page 799 and *Detroit Edison Co. v. C.I.R.*, 131 F. 2d 619. In the transfer between appellants there was consideration. Thus it would appear that the words "give away" as they

are found in Section 5848 (10), 26 U.S.C., are inapplicable.

Consideration will now be directed to the word "sell" as that word appears in Section 5848 (10), 26 U.S.C. Inasmuch as "sale" is a recognized variant, the common law as well as statutory definitions of "sale" must be scrutinized. No definition of either word is found in 26 U.S.C. In the absence of such definitions in the Internal Revenue Code, the several state definitions prevail. The Uniform Sales Act, enacted by the majority of the several States (at last count 38) distinguishes between sales and contracts to sell in its first section. In part, Section One of the Uniform Act or California Civil Code, Section 1721 is as follows:

> "Contracts to sell and sales. (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. (2) A *sale* of goods is an agreement whereby the seller *transfers the property* in goods to the buyer for a consideration called the price. (3) A *contract to sell* or a sale may be *absolute* or *conditional* . . ." (Emphasis added.)

The distinction noted above is further emphasized by Section 3 of the Act, or California Civil Code, Section 1723. This section reads as follows:

> "Form of contract for sale. Subject of the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly

by word of mouth, or may be inferred from the conduct of the parties."

See California Civil Code, Section 1740(1) which recognizes that contracts of sale may be conditional in that possession of goods may be retained by the seller subject to performance by the buyer of certain conditions. While not a conditional sales agreement, it is comparable in its legal effectiveness.

See also, Section 2980, California Civil Code, which concerns recordation of certain types of conditional sales contracts and Sections 2981 and 2982, California Civil Code, as those sections apply to automobile conditional sales. California Civil Code, Section 2981, (a) (1) and (a) (2) define two generally acceptable forms of conditional sales agreements pertaining to auto sales. However, these definitions are also accepted where any type of personalty may be sold subject to a contract wherein the seller retains legal title subject to conditions subsequent to be performed by the buyer, 78 C.J.S., Sales, pages 254 and 255, 22 Cal. Jur., Sales, Section 146, pages 1095 and 1096, *Woodbine v. Van Horn,* 29 C. 2d 95, 173 P. 2d 17 (holding that in a writing the use of the words "sell, sold and convey" usually indicate that the contract is one of sale and absolute as distinguished from conditional.)

See also *Fine v. Bradshaw,* 138 C.A. 2d 862, 292 P. 2d 537 and *Lunny v. Labrucherie,* 103 C.A. 2d 865, 230 P. 2d 427 for what constitute a valid conditional sales contract and holding also that such transactions are

executory as distinguished from sales which are executed and absolute.

Two recent Supreme Court of the United States decisions discuss "sale" as the word is found in the chapter on personal income tax. One is *Helvering v. Hammel* (1940), 311 U.S. 504, 85 L.Ed. 303, 61 S.Ct. 368. The other is *Helvering v. William Flaccus Oak Leather Co.* (1940), 313 U.S. 247, 85 L.Ed. 1310, 61 S.Ct. 878. In the former case the Court held that a foreclosure sale of taxpayers' property was a capital loss. The Court through Mr. Justice Stone on page 507 of the official reporter discusses the meaning of "sale" and also applies some rules of statutory construction. In the latter case, the Court held that insurance money received from the destruction of a building by fire was ordinary income and not capital gain or loss income resulting from an involuntary sale or exchange of a capital asset.

The words "to transfer" and "transferred" in Section 5848 (10), 26 U.S.C., "include" the various types of transactions which previously have been discussed. Consideration now will be given to the legal meaning of "to transfer", "transferred" and their noun variant "transfer". The text writer in 87 C.J.S. Transfer, at pages 894 and 895 states as follows:

> "As a verb. With certain exceptions, it is said that the verb cannot be held to have a well-defined technical legal meaning, and it is sometimes defined as meaning to bear over from one place to another, to carry across; and such meanings are often intended by its use. The verb 'transfer' is further defined as meaning to pass over; to con-

> vey or pass over the right of one person in property to another; to convey as a right from one person to another, to convey or remove from one place, person, etc., to another; to make over the possession or control of; to place in the hands of another, to grant; to assign; to sell or give."

In California, transfer is defined as an act whereby *title* to property is *conveyed* from one living person to another, California Civil Code, Section 1039. According to *Commercial Discount Co. v. Cowen,* ante, 18 C. 2d 610, 116 P. 2d 599 "transfer" connotes the passage of title to property from one person to another. Thus, there has been a common law and statutory distinction drawn between a transfer and a sale on the one hand and a conditional, executory title retaining conditional sales contract on the other hand.

As used in Section 5848 (10), 26 U.S.C., the expression "or otherwise dispose of" must now be considered.

It is axiomatic that the Internal Revenue Code of 1954, 26 U.S.C., being both a penal and a tax statute, should be strictly construed against appellee, the government, and liberally construed in favor of the taxpayer, appellants herein, *United States v. Giles,* 300 U.S. 41, 81 L.Ed. 493, 57 S.Ct. 340; *United States v. Resnick,* 299 U.S. 207, 81 L.Ed. 127, 57 S.Ct. 126; *Porter v. C.I.R.*, 288 U.S. 436, 77 L.Ed. 880, 53 S.Ct. 451.

Where statutory ambiguities arise and doubtful application of a tax measure to the taxpayer ensues, such doubtful application is resolved in favor of the

taxpayer and against the government, *Hassett v. Welch,* 303 U.S. 303, 82 L.Ed. 858, 58 S.Ct. 559 and *Hevering v. Marshall,* same citation.

Usually the language of a revenue law is to be given its ordinary meaning, *Helvering v. William Flaccus Oak Leather Co.,* ante, 313 U.S. 247, 85 L.Ed. 1310, 61 S.Ct. 878, and *Helvering v. Hammel,* ante, 311 U.S. 504, 85 L.Ed. 303, 61 S.Ct. 368.

The maxim of statutory construction "expressio unius est exclusio alterius", translated means "the mention of one is the exclusion of another", "expressum facit cessare tacitum", translated means "that which is expressed makes that which is implied to cease" and "noscitur a sociis" translated means "the meaning of doubtful words may be determined by reference to the associated words" apply, *United States v. Barnes,* 222 U.S. 513, 56 L.Ed. 291, 32 S.Ct. 117 and *Helvering v. Hammel,* ante, 311 U.S. 247, 85 L.Ed. 303, 61 S.Ct. 368.

If these rules are utilized in favor of appellants, an executory conditional sales agreement is a distinct and separate legal entity from a sale. Congress included such conditional sales agreements in other chapters of 26 U.S.C., [Retailers Excise Tax, Section 4053 (2) (3), 26 U.S.C.; Manufacturers Excise Tax, Section 4216 (c) (2) (3), 26 U.S.C.; Capital Stock Tax, Section 4351 (b), 26 U.S.C.; and Silver Bullion Tax, Section 4892, 26 U.S.C.].

The distinction between executory contracts of sale on the one hand and executed sales on the other hand

is borne out by other excise tax chapters. The "Definitions" Section 4761, 26 U.S.C., Marijuana, subdivision (4) "Transfer or transferred" provides as follows:

> "The term 'transfer' or 'transferred' means any type of disposition resulting in a *change of possession,* but shall not include a transfer to a common carrier for the purpose of transporting marihuana." (Emphasis.)

"(C)hange of possession" is the key phrase. Obviously, the Congress designedly used words of maximum application and scope by this language so that any change of possession of marijuana would be a taxable act.

If we consider Section 4892, 26 U.S.C., a similar analysis is possible. The chapter in which the section is found provides for a tax upon the "transfer" of silver bullion. Section 4892,—Definitions—(2) "Transfer" is as follows:

> "The term 'transfer' means a *sale, agreement of sale, agreement to sell,* memorandum of sale or delivery of, or transfer, whether made by assignment in blank or by any delivery, or by any paper or agreement or memorandum or any other evidence of transfer or sale; or means to make a transfer as so defined." (Emphasis.)

Inasmuch as the execution of an "agreement of sale" and "agreement to sell" are contracts which give rise to a taxable act, the execution of a conditional sales agreement, as defined in Section 1721,

California Civil Code (Section 1, Uniform Sales Act), would be within the purview of Section 4892.

Where identical expressions "transfer" or "transferred" are found in other excise statutes, but there are given a broader meaning than that expressed in Section 5848 (10), 26 U.S.C., it is inferred that Congress understood the legal meaning of the words and phrases that Congress employed and intended that varying meanings attach, *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427, 76 L.Ed. 1204, 52 S.Ct. 607.

All that Congress need have done to make the $200.00 tax provided for in Section 5811, 26 U.S.C., applicable to the execution of a conditional sales agreement as here employed by appellants would have been to enact a definition section comparable either to the language of Section 4761 (4) or 4892 (2), 26 U.S.C.

Since there are no other words in Section 5848 (10), 26 U.S.C., that apply, the section ought not to be expanded beyond its plain context, *McBoyle v. United States,* 283 U.S. 25, 75 L.Ed. 861, 51 S.Ct. 340 (aeroplane not included within National Motor Vehicle Theft Act) and *Fasulo v. United States,* 272 U.S. 620, 71 L.Ed. 443, 47 S.Ct. 200 (mailing threatening letters is not within purview of statute which punishes obtaining money by fraud).

Applied to the factual situation here at hand, it is apparent that the statutes under which appellants were convicted are not applicable and that therefore

the evidence is legally insufficient to sustain their several convictions.

II.

PURSUANT TO SECTION 5846, 26 U.S.C., OTHER EXCISE TAX DEFINITIONS AND PROCEDURES ARE INCORPORATED BY REFERENCE INTO CHAPTER 53. THE EFFECT OF THEIR INCORPORATION IS TO ADD OTHER MEANINGS TO SECTIONS 5811, 5814, 5848 (10) AND 5851, 26 U.S.C. AS APPLIED TO THESE APPELLANTS, PROCEDURAL DUE PROCESS IS VIOLATED.

Section 5846, 26 U.S.C., is as follows:

> "Other laws applicable. All provisions of law (including those relating to special taxes, to the assessment, collection, remission, and refund of internal revenue taxes, to the engraving, issuance, sale, accountability, cancellation, and distribution of taxpaid stamps provided for in the internal revenue laws, and to penalties) applicable with respect to the taxes imposed by sections 4701 and 4721, and all other provisions of the internal revenue laws shall, insofar as not inconsistent with the provisions of this chapter, be inapplicable with respect to the taxes imposed by sections 5811 (a), 5821 (a) and 5801."

The legal effect of this reference section is to incorporate into Chapter 53, 26 U.S.C., the provisions of other excise tax sections to the same extent as if they were set forth in detail in Chapter 53, *Engel v. Davenport,* 271 U.S. 33, 70 L.Ed. 813, 46 S.Ct. 410. Thus incorporated are Sections 4053 (2) (3) 26 U.S.C., Retailers Excise Tax (conditional sales agreements in-

cluded in transfer), Section 4216 (c) (2) (3) 26 U.S.C., Manufacturers Excise Tax (conditional sales agreements included in transfer), Sections 4341, 4343 and 4351 (b) 26 U.S.C., Capital Stock (beneficial interests taxed), Section 4761 (4), 26 U.S.C., Marijuana Tax Act (change of possession is taxable transfer) and Section 4892, 26 U.S.C., Silver Bullion Tax Act (conditional sales agreements taxable).

Section 5846 specifically incorporates Section 4701 and 4721, 26 U.S.C., a part of Chapter 39—Regulatory Taxes, subchapter A—Narcotic Drugs and Marijuana. By its language, a one-cent an ounce tax is imposed upon certain sales of drugs. Does this tax apply to machine guns in addition to the $200.00 transfer tax imposed according to Section 5811, 26 U.S.C.?

Section 4721, 26 U.S.C., states that an occupational tax on sellers is to be paid on or before July 1st of each year. Is this tax in addition to the $200.00 per weapon transfer tax set forth in Section 5811, 26 U.S.C.? Parenthetically, since no tax due date is mentioned in Chapter 53, 26 U.S.C., may appellants choose to await July 1, 1957, before paying the $200.00 tax per gun or the one-cent per ounce tax described in Section 4701, 26 U.S.C., ante?

For purposes of argument, let us assume that Section 5846, 26 U.S.C., is to be applied as written. Let us assume further that Section 5848 (10) "transfer or transferred" includes a conditional sales agreement. What then follows? Section 4053, 26 U.S.C., Retailers Excise Tax, provides that a proportionate

amount of tax imposed upon retailers' sales will be paid by the sellers as monies are paid by the buyers to the sellers on account of conditional sales agreements. A similar provision is found in Section 4216 (c), 26 U.S.C., Manufacturers Excise Taxes. The problem now is—is Section 5811, 26 U.S.C., modified by sections 4053 and 4216 (c), 26 U.S.C.? No inconsistency in application appears on the face of these several sections.

If Sections 4053 and 4216 (c) are incorporated by reference into Section 5811, 26, U.S.C., along with Section 4721, the taxpayer has these perilous alternatives. (1) Must he pay $200.00 per gun to the Treasury Department immediately upon the transfer of the weapon? (2) May he pay a proportionate amount of the $200.00 dependent upon the seller's receipt of installment payments? (3) May the seller taxpayer wait until July 1st of the tax year before paying all or a proportionate amount of the tax then due?

The instant taxpayer is compelled to choose a course of conduct among several apparently given to him by Congress at his peril.

Constitutional law and particularly procedural due process require that on its face a criminal statute must be sufficiently definite as to the conduct it proscribes or denounces that an ordinarily intelligent person might know that what he did does fall within the statute's prohibitory ambit, *United States v. Harriss* (1953), 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808.

At page 617 of the opinion, Mr. Chief Justice Warren, speaking for the Court's majority, states the rule to be as follows:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

See *United States v. Petrillo* (1947), 332 U.S. 1, 91 L. Ed. 1877, 67 S. Ct. 1538; *United States v. Cardiff* (1952), 344 U.S. 174, 97 L. Ed. 200, 73 S. Ct. 189. See also *Lanzetta v. New Jersey* (1939), 306 U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618, where the Court's opinion as to the rule of certitude is quoted as follows:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

In conclusion, it appears from the face of the statutes themselves, Sections 5811, 5814, 5846, 5848 (10) and 5851 that they are sufficiently uncertain and ambiguous as to require the taxpayer to chart his

course of action at his peril. By so doing, due process is violated.

III.

THE EVIDENCE CONCLUSIVELY SHOWS THAT APPELLANT VON EICHELBERGER OBTAINED POSSESSION OF THE INSTANT SUBMACHINE GUNS AT TIMES MORE THAN SIX YEARS PRIOR TO THE COMMENCEMENT OF THIS PROSECUTION AGAINST HIM. SECTION 6531, 26 U.S.C., BARS HIS CONVICTION UPON SEVEN COUNTS.

Section 6531, 26 U.S.C., is as follows:

> "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years . . ."

The evidence is uncontroverted that appellant von Eichelberger purchased these weapons in 1945, 1949 and 1950. All purchases occurred more than six years prior to 1957.

The language of Section 5851, 26 U.S.C., is as follows:

> "Possessing firearms unlawfully transferred or made—It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844 or 5846, or which has at any time been made in violation of section 5821. Whenever on trial for violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be

> deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."

von Eichelberger contends that his penal liability arises when he (1) failed to pay the $200.00 tax and/or (2) fails to use the prescribed order form. Further, he is of the opinion that the tax here imposed is an "act" not a "status" or "condition" tax.

It is the general rule that the statute of limitations begins to run in favor of a defendant from the moment that an indictment first could be filed.

This rule is enunciated in *United States v. Irvine* (1878), 98 U.S. 450, 25 L. Ed. 193. Mr. Justice Miller stated the rule to be as follows:

> "Whenever the act or series of acts necessary to constitute a . . . crime is complete, and from that day on the Statute of Limitations begins to run against the prosecution."

Further, he says:

> "There is in this but one offense. (The withholding of money by a lawyer from a client.) When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run."

United States v. Irvine, ante, has been followed without deviation since its writing. In *United States v. Kissel,* 218 U.S. 601, 54 L. Ed. 1168, 31 S. Ct. 124, where the exception of a continuing conspiracy was

first enunciated, speaking for the Court, Mr. Justice Holmes states the general rule to be:

> ". . . (M)ere continuance of the result of a crime does not continue the crime."

United States v. Irvine, ante, and *United States v. Kissel,* ante, are followed without deviation but with the usual embellishments. The Supreme Court of the United States applied the rule enunciated in Irvine to the cases of *Pendergast v. United States,* 317 U.S. 412, 417-418, 87 L. Ed. 368, 372, 63 S. Ct. 268; *Fiswick v. United States,* 329 U.S. 211, 216-217, 91 L. Ed. 196, 200, 67 S. Ct. 224; *Marzani v. United States,* 335 U.S. 895, 93 L. Ed. 431, 69 S. Ct. 297, 168 F. 2d 133; and *Bridges v. United States,* 346 U.S. 209, 97 L. Ed. 1557, 73 S. Ct. 1055. See *Bramblett v. United States, D. of C. Cir.,* 231 F. 2d 489; *Butzman v. United States,* 6 Cir., 205 F. 2d 343, 351; and *United States v. Mendoza,* D.C.N.D. Cal., 122 F. Supp. 367, 368. See also *Grunewald v. United States,* 1 L. Ed. 2d 931.

Applied to the factual situation here present, no act save that of continuous possession occurred during the period 1950 to 1957. The obligations and duties imposed upon von Eichelberger by Chapter 53, 26 U.S.C., Sections 5811, 5814 and 5851 required him to prepare an order form and pay a $200.00 per gun transfer tax. His duties were fixed at that time. No provision in 26 U.S.C., requires him each day, each month, each year to perform these statutory duties. As a matter of fact the regulations prepared by the Commission of Internal Revenue to Sections 5811

and 5814 compel payment of the $200.00 tax and preparation of the order form before possession of the guns may pass from seller to buyer. Thus, the violation of Section 5851 is fixed by the illegal transfer of the guns from seller to buyer without use of the order form and payment of the tax. From these days forward the statute of limitations ought to run in favor of appellant von Eichenberger.

IV.

APPELLANTS ASSERT PERSONAL AND SEPARATE RIGHTS TO THE SEIZED EVIDENCE. APPELLANT TERZIAN ADDITIONALLY ASSERTS AN INTEREST IN THE PROPERTY WHERE THE SEIZURE OCCURRED. THEY ARE "PARTIES AGGRIEVED" WITHIN THE MEANING OF RULE 41, FEDERAL RULES OF CRIMINAL PROCEDURE. THEY ASSERT THEIR CONSTITUTIONAL RIGHT TO BE PROTECTED AGAINST THIS UNREASONABLE SEARCH AND SEIZURE. SINCE NEITHER TROST NOR THE AGENTS HAD APPELLANTS' PERMISSION TO ENTER, OPEN THAT WHICH WAS SECURED AND SEIZED, THEY CONTEND THAT THE SEARCH WAS UNREASONABLE AND THE EVIDENCE LEGALLY INSUFFICIENT TO SUPPORT THEIR CONVICTIONS.

Appellant Harry T. von Eichelberger asserts ownership of the submachine guns here in issue pursuant to the provision of the conditional sales agreement of December 5, 1956. Appellant Haig Mihram Terzian claims that he had a right to the possession of those same weapons by the agreement. Further, Haig Mihram Terzian states that he had an interest in Louis Trost's garage at 80 Julien Avenue, San Francisco. This interest, under California law, is known as a license.

A license is created in real property when the landlord retains his use and occupation of the premises but gives to the licensee a right of joint use and occupancy, *Kaiser Co. v. Reid* (1947), 30 C. 2d 610, 184 P. 2d 879 and *Takahashi v. Fish and Game Commission* (1947), 30 C. 2d 719, 185 P. 2d 805.

Sections 282, 282a, 282b and 282c, 5 U.S.C., establish the Bureau of Narcotics. Sections 7601-7606, 26 U.S.C., authorize inspection of places where taxable goods may be found. Rule 41, Federal Rules of Criminal Procedure, the adoption of which is provided for in Section 3041, 18 U.S.C., requires a search warrant in order that an entry into private premises be lawful. An exception is noted, to-wit, section 2236, 18 U.S.C., which provides that a federal agent may lawfully enter premises if there is either consent or invitation to enter.

The government will contend that the entry of the agents in Trost's garage was by Trost's invitation and consent. This is not disputed. However, without authority from Terzian, Trost may not give permission to strangers to open secured boxes (no machine guns were in plain view, *Marron v. United States,* 275 U.S. 192, 72 L. Ed. 231, 48 S. Ct. 74).

Ownership of the property seized (appellant Harry T. von Eichelberger) or the right to possess the property seized (appellant Haig Mihram Terzian) plus an interest in the premises where the property was seized (appellant Haig Mihram Terzian) are sufficient legal interests upon which appellants may assert their con-

stitutional privilege against an unreasonable search and seizure as here conducted by United States agents without lawful process, *United States v. Jeffers,* 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 and *Klee v. United States* (1931, C.C.A. 9), 53 F. 2d 58.

The evidence is legally insufficient to sustain their convictions without the evidence that was unreasonably procured.

CONCLUSION.

Appellants respectfully pray for the reversal of their several convictions, with direction to the trial Court to enter a judgment of acquittal on all counts.

Dated, San Francisco, California,
September 16, 1957.

Respectfully submitted,
GREGORY S. STOUT,
Attorney for Appellants.